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No. 83-2146

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In The
Supreme Court of the United States
October Term, 1984

—○—
RICHARD WILSON and MARTIN VIGIL,
Petitioners,

v.

GARY GARCIA,
Respondent.

—○—
**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

—○—
BRIEF FOR PETITIONERS

—○—
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QUESTIONS PRESENTED

1. When an action for the deprivation of constitutional rights is brought in federal court under 42 U.S.C. § 1983, may the federal court disregard the limitations period held applicable by the state's highest court to an identical action brought in state court under 42 U.S.C. § 1983, where the limitations period applied in state court is neither too short nor inconsistent with the Constitution and laws of the United States?
2. If the federal court may disregard the limitations period applied by the state's highest court to § 1983 actions filed in state court, what are the characteristics of an action under 42 U.S.C. § 1983 that the federal court must consider in identifying the most closely analogous cause of action and its applicable statute of limitations as required under *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975)?

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 731 F.2d 640 (10th Cir. 1984), and is reproduced as Appendix A to the Petition for Writ of Certiorari filed in this matter. (Pet. App. 1.) The opinion of the district court is not reported; it is reproduced as Appendix B to the Petition. (Pet. App. 28.)

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1984. (J.A. 2, 3). Petitioners filed their Petition for Writ of Certiorari on June 28, 1984. The Petition was granted by order of this Court on October 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



CONSTITUTIONAL PROVISIONS AND STATUTES

The following statutory provisions are relevant to the consideration of this matter: 42 U.S.C. § 1983, 42 U.S.C. § 1988, N.M. Stat. Ann. § 41-4-12 (1978), N.M. Stat. Ann. § 41-4-15 (1978), N.M. Stat. Ann. § 37-1-8 (1978), and N.M. Stat. Ann. § 37-1-4 (1978). The full text of each of these statutes is set forth in Appendix C to the Petition for Writ of Certiorari filed in this matter. (Pet. App. 46-48.)



STATEMENT OF THE CASE

Respondent Gary Garcia brought this action under 42 U.S.C. § 1983 (hereinafter § 1983) against Petitioners Richard Wilson, a former New Mexico State Police Officer, and Martin Vigil, Chief of the New Mexico State Police (hereinafter the Officers), seeking money damages for the alleged deprivation of constitutional rights arising out of Garcia's arrest by Officer Wilson. (J.A. 4-9.) Garcia alleged that Officer Wilson used excessive force in connection with the arrest, that Chief Vigil should not have allowed or caused Officer Wilson to be hired as a

New Mexico State Police Officer, and that Chief Vigil failed to provide adequate supervision. (J.A. 4-9.) According to the complaint, the incident in question occurred on April 27, 1979. (J.A. 5-6.) This action, however, was not filed until January 28, 1982—more than two years later. (J.A. 1.)

In response to Garcia's complaint, the Officers filed motions to dismiss on the ground that the action was barred by the applicable statute of limitations. (J.A. 10, 17.) In support of their motions, the Officers relied on the holdings and reasoning of *DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981), and *DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 563, 642 P.2d 166 (1982). In the *DeVargas* cases, New Mexico's appellate courts reviewed the guidelines for selecting the statute of limitations applicable to an action brought under § 1983. Reasoning that under *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), a court must apply the limitations period applicable to the state cause of action most closely analogous to the action brought under § 1983, those courts ruled that the most closely analogous state cause of action in New Mexico to a police brutality action brought under § 1983 is set forth in section 41-4-12 of the New Mexico statutes, N.M. Stat. Ann. § 41-4-12 (1978), which provides a cause of action against New Mexico law enforcement officers for assault, battery, or the deprivation of constitutional rights. The court therefore held that a § 1983 police brutality claim brought in state court against New Mexico law enforcement officers is governed by the two-year limitations period applicable to claims asserted under section 41-4-12. N.M. Stat. Ann. § 41-4-15 (1978); *DeVargas*, 97 N.M. at 564, 642 P.2d at 167.

On July 21, 1982, the trial court entered its order denying the Officers' motions. (J.A. 2; Pet. App. 45.) In its opinion, the court refused to follow the state court decisions in *DeVargas* (Pet. App. 42), holding instead that a § 1983 action is *sui generis* and not analogous to any state cause of action, including one brought under section 41-4-12. (Pet. App. 39-44.) The trial court characterized Garcia's claim as an "action on a statute" and held that since New Mexico has no statute of limitations specifically applicable to statutory actions, Garcia's claim would be governed by New Mexico's four-year residual statute of limitations applicable to an action not subject to any other specified period of limitations. N.M. Stat. Ann. § 37-1-4 (1978). (Pet. App. 44.)

Recognizing the conflict between its opinion and the position adopted by New Mexico's highest courts, the trial court certified the question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Pet. App. 45.) On January 6, 1983, the Court of Appeals for the Tenth Circuit granted the Officers' request for leave to appeal. (R. 54.)

On March 30, 1984, the court of appeals sitting *en banc* issued its Memorandum Opinion and Order of Judgment. *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984). (Pet. App. 1.) In its opinion, the court rejected the trial court's characterization of § 1983 as an action on a statute. Nevertheless, the court of appeals affirmed the order of the trial court refusing to dismiss the complaint. Using this case as an opportunity to survey conflicting decisions within and outside the circuit on the applicability of state statutes of limitations to § 1983 actions, the Tenth Circuit adopted the view for statute of limitations purposes that all § 1983 claims within the circuit should be uniformly

characterized, without regard for state law, as actions for injury to personal rights. Accordingly, the court held that the appropriate limitations period for all § 1983 actions filed in New Mexico was that set forth in section 37-1-8 of the New Mexico statutes, N.M. Stat. Ann. § 37-1-8 (1978), which provides a three-year limitations period for actions alleging "an injury to the person or reputation of any person." Consequently, the court concluded that Garcia's complaint was timely filed.

In its opinion, the Tenth Circuit acknowledged that its conclusion was at variance with the New Mexico Supreme Court's holding in *DeVargas*, but declined to follow that decision. 731 F.2d at 651-52 n.5. The Tenth Circuit also acknowledged that its approach to the statute of limitations issue conflicted with that adopted by at least three other circuits. See, e.g., *McClam v. Barry*, 697 F.2d 366 (D.C. Cir. 1983) (holding that § 1983 claims must be characterized for statute of limitations purposes by the underlying facts alleged in the plaintiff's complaint); *Aitchison v. Raffiani*, 708 F.2d 96, 101 (3d Cir. 1983) (reaffirming *Polite v. Diehl*, 507 F.2d 119, 122 (3d Cir. 1974) (*en banc*), which held that the limitations statute to be applied is the statute that would have been applied if the same or a similar action were filed in state court); *Kosikowski v. Bourne*, 659 F.2d 105 (9th Cir. 1981) (holding that a state's articulation of the limitations period specifically applicable to § 1983 claims is determinative of the federal issue and relieves the federal court from the task of characterizing a civil rights claim).

On June 28, 1984, the Officers filed a Petition for Writ of Certiorari with this Court. The Petition was granted on October 1, 1984.

SUMMARY OF ARGUMENT

I. Because federal law provides no limitations period for actions brought under 42 U.S.C. § 1983, the application of the forum state's law of limitations is required by 42 U.S.C. § 1988. *Board of Regents v. Tomanio*. New Mexico law, as expressed in *DeVargas*, applies a two-year limitations period, N.M. Stat. Ann. § 41-4-15 (1978), to § 1983 actions, such as the case at bar, which are founded on claims of police brutality. The court below erred in holding that it could ignore *DeVargas* and independently characterize this action. Characterizing an action to find an analogous state cause of action is simply a method used to ascertain state law; a federal court needs to engage in such an analysis only when state law is unclear. Furthermore, the characterization that state law would impose on this action should not be rejected unless inconsistent with federal law. *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). In keeping with the principles of federalism incorporated in § 1988, a state's determination of an analogous cause of action should be respected. The strong federal interests reflected in § 1983 are protected by consideration of whether the applicable state law is inconsistent with the federal constitution or laws. *Burnett v. Grattan*, 104 S. Ct. 2924, 2928-29 (1984). Since section 41-4-15 neither provides a limitations period that is too short nor results in discrimination against the federal claim, the application of section 41-4-15 to this action would not be inconsistent with federal law or the policies of compensation and deterrence which underlie § 1983.

II. Even if a federal court is free to disregard state law on point in selecting an applicable statute of limitations, the court below nevertheless erred in failing to prop-

erly characterize the plaintiff's claims in order to identify the most closely analogous state cause of action. Specifically, the court below erred in failing to characterize this action within the framework of state law, according to the factors considered by New Mexico in formulating its policies of repose and statutes of limitations. See *Board of Regents v. Tomanio*; *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). Instead, the court of appeals adopted a uniform characterization of all § 1983 actions and thus identified an analogous state action without reference to the causes of action recognized by the state or how the state applies its statutes of limitations to those actions. Because the court below failed to give any deference to the policies and law of New Mexico, its attempt at uniform characterization results in an arbitrary decision having no application to the spirit and letter of § 1988's mandate to apply state law. A proper analysis of this issue leads to the conclusion that section 41-4-15 should apply to this action. The court below should therefore be reversed.

ARGUMENT

I. The Court Of Appeals Erred In Refusing To Apply To This Action The Statute Of Limitations Held Applicable By The New Mexico Supreme Court To An Identical Action Filed In State Court Under 42 U.S.C. § 1983.

Congress has not provided a specific limitations period to govern actions brought under 42 U.S.C. § 1983 (hereinafter § 1983). Section 1988 of title 42, however, provides

that where the provisions of that title are "deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the constitution and statutes of the State[s] . . . shall be extended to and govern" federal courts in the trial and disposition of any action brought under title 42. 42 U.S.C. § 1988 (hereinafter § 1988). Section 1988 further provides that state law may be disregarded only if found to be inconsistent with the constitution or laws of the United States. 42 U.S.C. § 1988; *Board of Regents v. Tomanio*, 446 U.S. at 485-86.

The determination of a rule of decision necessary for adjudication under § 1988 is a three-step process. *Burnett v. Grattan*, 104 S. Ct. at 2928-29. First, the court must determine whether there is suitable federal law; if no applicable federal law exists, the court must look to state law. Only after determining the state law does a court reach the third step, an analysis of whether the state law is inconsistent with the constitution and laws of the United States. It is this third step which principally protects the predominance of the federal interest. *Id.* The court below never reached the third step of the *Burnett* analysis because, in addressing the second step, it ignored state law on point, holding that it need not defer to or even consider the state's identification of the cause of action most analogous to the plaintiff's claim. In so doing, the court violated the mandate of § 1988. Because the court of appeals refused to apply to this § 1983 action the statute of limitations that would have been applied to the action had it been filed in state court, the judgment of the court below should be reversed.

A. The Court Below Erred in Undertaking an Independent Analysis To Find an Applicable Statute of Limitations Because § 1988 Directs That a State Determination of the Applicable Statute Should Not Be Rejected Unless It Is Inconsistent with Federal Law.

It is "now settled" that § 1988 requires federal courts to look to state law in resolving issues of limitations in actions brought under § 1983. *Burnett v. Grattan*, 104 S. Ct. at 2929. The determination that is to be made in such cases has been described in a variety of ways. *Id.* This Court has alternatively identified the applicable statute of limitations as the "most appropriate [statute of limitations] provided by state law," *Johnson v. Railway Express*, 421 U.S. at 462, the statute "governing an analogous cause of action," *Board of Regents v. Tomanio*, 446 U.S. at 483-84, and the statute "which the State would apply if the action had been brought in a state court," *Johnson v. Railway Express*, 421 U.S. at 469 (Marshall, J., concurring in part and dissenting in part). *Burnett*, 104 S. Ct. at 2929. Each of these descriptions, however, merely expresses the result sought by § 1988: the application of the proper state law. If a state has specifically addressed, and answered, the question of "which [statute of limitations] the State would apply if [a § 1983] action had been brought in a state court," a federal court need go no further in ascertaining the applicable state law: § 1988 requires that the court respect the state's selection of a limitations period unless to do so would be inconsistent with federal law. 42 U.S.C. § 1988; see *Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express*.

1. New Mexico law holds that the state cause of action most analogous to the plaintiff's § 1983 claims in this case is an action brought under N.M. Stat. Ann. § 41-4-12, to which the limitations period of N.M. Stat. Ann. § 41-4-15 applies.

In *DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 563, 642 P.2d 166 (1982), the New Mexico Supreme Court held that a § 1983 action for alleged police brutality brought in state court was governed by the two-year statute of limitations set forth in N.M. Stat. Ann. § 41-4-15 (1978). See *DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 447, 451, 640 P.2d 1327, 1331 (Ct. App. 1981), *cert. quashed*, 97 N.M. 563, 642 P.2d 166 (1982) (hereinafter cited as *De Vargas* (Ct. App.)). That statute provides that "[a]ctions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death. . . ." N.M. Stat. Ann. § 41-4-15 (1978).

DeVargas involved an action brought in state court under § 1983. In his complaint, the plaintiff in *DeVargas* alleged that he had been deprived of federal constitutional rights as a result of a beating he had received from employees of the New Mexico Department of Corrections while he was incarcerated at the state penitentiary. *DeVargas* (Ct. App.), 97 N.M. at 449, 640 P.2d at 1329. The trial court denied a motion to dismiss the complaint as untimely; the court of appeals reversed. Although the court of appeals did not adopt a specific period of limitations for the plaintiff's action, the court stated, "In our opinion, the two-year period [of § 41-4-15] is the applicable

limitation period to plaintiff's claims against [the Warden of the Penitentiary] under § 1983." 97 N.M. at 451, 640 P.2d at 1331.

On certiorari, the New Mexico Supreme Court agreed.¹ In its opinion, the supreme court held that the state cause of action "most closely analogous" to the § 1983 action before the court was an action brought under section 41-4-12 of the New Mexico statutes, N.M. Stat. Ann. § 41-4-12 (1978) (hereinafter section 12). Section 12 imposes liability against law enforcement officers for personal injury, bodily injury, wrongful death or property damage resulting from, *inter alia*, assault, battery or the deprivation of federal or state constitutional rights. Since N.M. Stat. Ann. § 41-4-15 (hereinafter section 15) provides a two-year statute of limitations for actions brought under section 12, 97 N.M. at 564, 642 P.2d at 167, the New Mexico Supreme Court held that this same two-year limitations period should and would apply to a § 1983 action brought in state court which was founded on claims of police brutality.

The instant case is virtually identical to *DeVargas*. As in *DeVargas*, the plaintiff in this case bases his § 1983 action on claims of police brutality; the incidents giving rise to the plaintiff's action occurred in New Mexico; and the plaintiff's complaint was brought against New Mexico law enforcement officers. Since the plaintiff here filed his complaint over two years after his cause of action accrued, his complaint, if filed in state court, would have been untimely under *DeVargas*.

¹ The published opinion of the New Mexico Supreme Court in *DeVargas* was issued as the court's decision quashing its writ of certiorari.

Despite the admonition of this Court that a federal court must "[rely] on the State's wisdom in setting a limit . . . on the prosecution" of a federal civil rights claim, *Johnson v. Railway Express*, 421 U.S. at 464, the court of appeals refused the guidance of the New Mexico courts in *DeVargas*. The court ruled instead that any § 1983 action filed in a federal court sitting in New Mexico would be governed not by the two-year period set forth in section 15, but by the three-year period set forth in section 37-1-8 of the New Mexico statutes, N.M. Stat. Ann. § 37-1-8 (1978), which governs actions for injuries to the person. Without finding that the state court's determination in *DeVargas* was inconsistent with federal law, the court below baldly dismissed in a footnote the determination by the state court of the state's most analogous cause of action and substituted its independent analysis of the most analogous state law. In so doing, the Tenth Circuit failed to follow the prescript of this Court and invaded the unique province of the state courts.

2. In applying a state's statutes of limitations, a state court's characterization of a federal claim for the purpose of identifying an analogous state action should not be rejected unless it is inconsistent with federal law.

The court below attempted to justify ignoring *DeVargas* on the ground that it was entitled to "characterize" a § 1983 action without reference to state law. 731 F.2d at 651-52 n.5. The process of characterizing a federal claim for the purpose of identifying the most closely analogous state cause of action, however, is simply a tool which courts have historically used when state law is unclear in order to effectuate § 1988's mandate to apply state law. See *Runyon v. McCrary*. As the Court of Appeals for the

Ninth Circuit held in *Kosikowski v. Bourne*, "[c]haracterization serves no purpose other than to provide guidance in the selection of the applicable state statute. When the state has expressly made that selection the federal courts should accept it unless to do so would frustrate the purposes served by the federal law upon which the plaintiff's claims rest." 659 F.2d at 107.²

The role that characterization plays in the process of selecting a state statute of limitations can best be understood in the context of § 1988 and the case law interpreting that statute. Given that § 1988, by its terms, requires a federal court to apply state law, "[t]he applicable period of limitations is derived from that which the state would apply if an action seeking similar relief had been brought in a state court." *Johnson v. Railway Express*, 421 U.S. at 469 (Marshall, J., concurring in part and dissenting in part). If that limitations period has been identified by the

² In *Kosikowski*, the Ninth Circuit held that the two-year statute of limitations contained in the Oregon Tort Claims Act governed an action brought in federal court under 42 U.S.C. § 1983. Although that court previously had ruled that § 1983 actions filed in Oregon were governed by the six-year limitations period applicable to causes of action created by statute, *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980), the court in *Kosikowski* held that it was bound by legislation enacted after its decision in *Clark* by which the state legislature evidenced an intent that § 1983 actions be governed by the limitations period set forth in the Oregon Tort Claims Act. "This precise expression of the intent of the Oregon Legislature makes unnecessary a resort to a characterization of appellants' cause of action in the manner employed by this court in [*Clark*]." 659 F.2d at 107. See *Burnett v. Grattan* (Rehnquist, J., concurring). The Tenth Circuit, in its opinion below, specifically rejected the Ninth Circuit's holding in *Kosikowski*. 731 F.2d at 649. The Tenth Circuit, therefore, has held in effect that no expression of state law would be sufficient to warrant consideration in determining a limitations period for § 1983 actions.

state, either through legislation or case law, the federal court must apply the same statute of limitations unless to do so would be inconsistent with federal law. *Burnett v. Grattan*, 104 S. Ct. at 2935 (Rehnquist, J., concurring); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 64 (1981); *Runyon v. McCrary*; *Johnson v. Railway Express*; *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc.*, 698 F.2d 676 (4th Cir. 1983); *Aitchison v. Raffiani*. If, however, the state has not identified the limitations period it would apply if the action were brought in state court, the federal court must attempt to identify the appropriate state statute of limitations by referring to the limitations period applicable to the most analogous state cause of action.³ *Board of Regents v. Tomanio*. Characterization is merely a method used to identify the state's most analogous cause of action if the state itself has not already done so.⁴ See *Runyon v. McCrary*; *Jones v. Orleans Parish*

³ Justice Rehnquist, in his concurring opinion in *Burnett v. Grattan*, characterized the issue before the Court as a question of whether the state intended the six-month limitations period at issue to apply to the federal civil rights claims raised in that case. 104 S. Ct. at 2936. Since the intent of a legislature, if not express, can best be determined by an analysis of how the state applies and interprets its own statutory scheme of limitations, a state's characterization of an action filed in state court under § 1983 as analogous to one of its own causes of action for statute of limitations purposes is determinative of the state's intent.

⁴ Section 1988 requires a federal court to apply state law; § 1988 does not speak of analogous causes of action or of characterization. Because New Mexico law is clear, the instant case is the most straightforward of all the § 1983 statute of limitations cases decided by this Court in recent years. In cases

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School Board, 679 F.2d 32, 35, modified, 688 F.2d 342 (5th Cir. 1982), cert. denied, 103 S. Ct. 2420 (1983); *Warren v. Norman Realty Co.*, 513 F.2d 730 (8th Cir. 1975).

The term "characterization" was first used in connection with the process of identifying a state statute of limitations applicable to a federal claim in *International Union v. Hoosier Cardinal Corp.* In that case, the Court held that state statutes of limitations governed actions brought under § 301 of the Labor Relations Act. In choosing the appropriate state statute of limitations to apply to the matter before it, the Court held that even if, under federal law, a "§ 301 suit must be regarded as exclusively bottomed upon the written collective bargaining agreement," the characterization that Indiana law would impose on a § 301 claim in applying its own statutes of limitations should not be rejected by a federal court when searching for an appropriate limitations period.

We agree that the characterization of this action for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law. . . . But there is no reason to reject the characterization that state law would impose unless that char-

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previously decided, e.g., *Burnett v. Grattan*; *Chardon v. Fumero Soto*, 462 U.S. 650 (1983); *Board of Regents v. Tomanio*; *Johnson v. Railway Express*; see also *Robertson v. Wegmann*, 436 U.S. 584 (1978); *Runyon v. McCrary*, the state rule of decision was unknown because in each case neither the state legislature nor the state appellate courts had addressed the issue. Given this uncertainty regarding the state rule, the courts in each case had to make independent decisions about which limitations period to apply. Here, however, New Mexico law is clear on the specific question presented. The federal courts are therefore relieved of having to undertake the sometimes difficult process of characterizing the plaintiff's claim in an effort to find the most analogous state cause of action and then identifying the limitations period applicable to that action.

acterization is unreasonable or otherwise inconsistent with national labor policy.

383 U.S. at 706 (emphasis added, citations omitted). Finding that Indiana would characterize the claim before the Court as an action founded at least in part on individual oral contracts of employment, the Court held that the action before it was governed by the Indiana statute of limitations applicable to actions on unwritten contracts.

While the court of appeals in its opinion below cited *Hoosier Cardinal* for the proposition that "[c]haracterization of such a federal claim is a matter of federal law," 731 F.2d at 642, the court completely ignored this Court's caveat that a state's characterization of the federal claim should not be rejected unless found to be inconsistent with federal law.⁵ Since the court below refused to acknowledge that New Mexico's characterization of a § 1983 action in the context of applying its own statutes of limitations was even relevant to its decision, the court's analysis is fundamentally erroneous and must be rejected. See *Runyon v. McCrary*, 427 U.S. at 181 (the selection of a statute of limitations in a federal civil rights action is a "situation in which a federal right depend[s] upon the interpretation of state law"); *McNutt v. Duke Prec'sion*, 698 F.2d at 679 ("Had there been in Maryland a decision or body of decisions on the subject [of the appropriate limitations

⁵ This Court in *Hoosier Cardinal* was concerned with adopting a limitations period for a federal claim in the face of congressional silence. The Court, inferring from this silence a congressional intent to look to state law in selecting an appropriate limitations period, deferred to the state's characterization of the federal claim when applying the state's own law of limitations. The case for deference would seem even stronger in a civil rights action, where the reference to state law is explicit. 42 U.S.C. § 1988; *Board of Regents v. Tomanio*.

period in a § 1981 action] which were not discriminatory in their result, we would probably accept them as the common law of the State of Maryland, for we are authorized by § 1988 to apply her common law as well as statutes.").

Although both the trial court and the court of appeals in the case at bar refused to follow *DeVargas*, neither court found that the application of the statute of limitations identified therein would be inconsistent with federal law or even inappropriate.⁶ The court of appeals, in fact, did not feel compelled even to address *DeVargas*. Stating that "we are unwilling to hold that a state's articulation of the limitations period specifically applicable to section 1983 claims . . . relieves the federal courts from characterizing a civil rights claim as a matter of federal law," 731 F.2d at 649, the court dismissed *DeVargas* in a footnote: "Because the conclusion reached in *DeVargas* is at variance with our analysis in this case, we do not adopt it." 731 F.2d at 652 n.5.

The court's cavalier dismissal of *DeVargas* is inappropriate. The application of state limitations law in § 1983 actions is mandatory, not permissive. 42 U.S.C. § 1988; *Board of Regents v. Tomanio*. Once the state has resolved the issue of which of its statutes of limitations is applicable to a § 1983 action, the role of the federal court

⁶ Indeed, the trial court found that "the method of characterization adopted in *DeVargas* is not without appeal. Courts are frequently faced with cases involving fact patterns similar to that before the New Mexico courts in *DeVargas*: alleged deprivation of constitutional rights committed by law enforcement . . . officers under color of state law. In such cases, cogent arguments can be made that [claims under section 12] are most closely analogous to those types of § 1983 claims." (Pet. App. 42-43.)

is to determine whether the application of that statute is inconsistent with the constitution or laws of the United States. See *Burnett v. Grattan*, 104 S. Ct. at 2929. The tripartite analysis endorsed by this Court in *Burnett* and earlier cases incorporates the principal means of preserving the predominance of the federal interest. By recognizing a state's interpretation of its own law, a federal court gives proper deference to a state's right to define its legislative acts; by then asking whether the state law is in any way inconsistent with the federal constitution or laws, a federal court protects the federal interest in the federal cause of action.

3. The lower court's failure to defer to state law in the application of the state's own statute's of limitations violates the principles of federalism incorporated in § 1988.

As this Court has recognized, the congressional intent to apply state law expressed in § 1988 is entirely consistent with principles of federalism. In *Board of Regents v. Tomanio*, for instance, this Court held that

[T]he application of the New York law of tolling is in fact more consistent with the policies of "federalism" invoked by the Court of Appeals, than a rule which displaces the state rule in favor of an ad hoc federal rule. . . . Considerations of federalism are quite appropriate in adjudicating federal suits based on 42 U.S.C. § 1983. . . . But the Court of Appeals' rule allowing tolling can scarcely be deemed a triumph of federalism when it necessitates a rejection of the rule actually chosen by the New York Legislature.

446 U.S. at 491-92 (citations omitted). See *Younger v. Harris*, 401 U.S. 37, 44-45 (1971) (recognizing "a system

in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States"). By claiming the right to independently characterize a § 1983 action, thereby disregarding any state law on point, the court of appeals has essentially created exactly the kind of "ad hoc federal rule" rejected by this Court in *Tomanio*.

Rather than achieving uniformity or harmonizing § 1983 jurisprudence with comparable state law, the Tenth Circuit's decision creates an irreconcilable conflict between federal and state courts without serving any overriding federal interest. As a result of the Tenth Circuit's decision, the choice of the statute of limitations that will govern a § 1983 action against law enforcement officers in New Mexico depends solely on whether the action is filed in federal or state court.⁷ This is precisely the sort of result federal courts have attempted to discourage since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

The rule that the Tenth Circuit disregarded in this case is clear: § 1988 requires the application of state law, including both common law and statutory law. How New Mexico would apply its own statutes of limitations is a

⁷ In addition to providing a remedy for the deprivation of federal constitutional rights, section 12 creates a cause of action for the deprivation of rights arising under the Constitution of the State of New Mexico. If the court below is affirmed, litigants would be allowed only two years to bring an action for the deprivation of rights arising under the state constitution but three years to bring an action in federal court arising under the federal constitution.

question uniquely suited to resolution by New Mexico courts. See *Major v. Arizona State Prison*, 642 F.2d 311, 313 (9th Cir. 1981). "No rule is more firmly established than that this court will follow the construction given by the supreme court of a state to a statute of limitations. . . ." *Dibble v. Bellingham Bay Land Co.*, 163 U.S. 63, 73 (1896). See *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 397-98 (1906); *Leffingwell v. Warren*, 67 U.S. (2 Black) 599, 603 (1862); cf. *Runyon v. McCrary*, 427 U.S. at 181 (the "federal right depend[s] upon the interpretation of state law"; resolution of issue is "heavily contingent upon an analysis of state law"). The relevant factor for the federal court is that the state has made a determination regarding the applicable statute of limitations; "[w]hen the state has expressly made that selection the federal courts should accept it unless to do so would frustrate the purposes served by federal law" *Kosikowski v. Bourne*, 659 F.2d at 107. See *McNutt v. Duke Precision*.

The Supreme Court of New Mexico has made a definitive decision that a § 1983 action for alleged police brutality in New Mexico is governed by the two-year limitations period set forth in N.M. Stat. Ann. § 41-4-15 (1978). Application of that limitations period is reasonable and consistent with federal law. The courts below therefore erred in not applying that statute to the plaintiff's claims.

B. The Application of N.M. Stat. Ann. § 41-4-15 (1978) to a Civil Rights Claim Is Not Inconsistent with the Constitution and Laws of the United States or the Policies Underlying § 1983.

A state's determination of the statute of limitations applicable to a § 1983 claim is controlling unless that lim-

itations period is inconsistent with the constitution or laws of the United States. See discussion *supra* Point I(A) and 42 U.S.C. § 1988. A determination of whether there is an inconsistency between application of the state limitations period and federal law is subdivided into two issues: first, does the state statute provide an unduly short period which would undermine the federal right, and second, does the state statute discriminate against a federal right by providing a longer limitations period for an analogous state right. *Campbell v. City of Haverhill*, 155 U.S. 610, 615 (1895); see *Burnett v. Grattan* (Rehnquist, J., concurring); *Pufahl v. Parks*, 299 U.S. 217 (1936). In this case, the application of section 15 results neither in a period that is too short nor in one that discriminates against the federal cause of action.

The two-year period provided in section 15 is not *per se* too short, nor have the respondents argued that it is. This Court upheld the application of a two-year statute of limitations to § 1981 claims in *Runyon v. McCrary*, and suggested that a one-year statute was acceptable in *Johnson v. Railway Express* (affirming dismissal of a claim under 42 U.S.C. § 1981 under Tennessee's one-year limitations period). A two-year limitations period allows a plaintiff sufficient time to marshal the information necessary to file a complaint, see *Burnett v. Grattan*, and thus is consistent with the federal policies behind § 1983—the compensation of persons injured by the deprivation of their federal rights and the prevention of abuses of power by those acting under color of state law. *Robertson v. Wegmann*, 436 U.S. at 591.

Nor does the application of section 15 discriminate against the federal cause of action. It provides precisely

the same period of limitations for actions arising under the constitution and laws of New Mexico as it does for actions arising under the constitution and laws of the United States. Section 12, the underlying cause of action found by the state to be most analogous to a § 1983 claim, imposes liability in actions against law enforcement officers for the "deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico" as well as for state law claims for "personal injury, bodily injury, wrongful death or property damage."

The applicability of sections 12 and 15 to state and federal claims alike differentiates the statute at issue in the case at bar from those at issue in cases such as *Johnson v. Davis*, 582 F.2d 1316 (4th Cir. 1978). In *Johnson*, the court held that Virginia's one-year statute of limitations, applicable only to federal civil rights actions, constituted an unfounded discrimination against the federal cause of action and was inconsistent with Virginia's scheme of limitations. The statute at issue in the case at bar, however, applies equally to federal and state claims. In addition, that statute is consistent with New Mexico's scheme of limitations. Like other limitations periods, section 15 is based on a number of factors, including the underlying facts of a claim, the parties involved, and the nature of the right violated. See discussion *infra* at Point II(B). Thus section 15, unlike the statute at issue in *Johnson*, does not single out the federal claim and does not, in a manner inconsistent with the entire limitations scheme of the state, apply a shorter period of limitations to federal claims than to state claims.

Deterrence and compensation have been recognized as the principal federal policies furthered by the federal

civil rights laws. *Board of Regents v. Tomanio*, 446 U.S. at 488; *Robertson v. Wegmann*, 436 U.S. at 590. In *Wegmann*, the Court identified three factors which demonstrated that application of the state rule of law in that case would be consistent with both of these policies; significantly, all three factors are also present in the case at hand. First, as in *Wegmann*, the application of the state rule of law is not inconsistent with policies of compensation or deterrence. *Board of Regents v. Tomanio*. The two-year limitations period imposed by state law addresses the initiation of court proceedings and provides an adequate period of time within which a plaintiff may seek relief. See *Burnett v. Grattan*. Second, application of the state rule will not automatically defeat all federal civil rights claims to which the rule is applied. Indeed, "neither of these policies [deterrence and compensation] is significantly affected by" the application of this limitations period since "plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence" simply by commencing their actions within two years. *Board of Regents v. Tomanio*, 446 U.S. at 488; see also *Burnett v. Grattan*. Third, as in *Wegmann*, federal statutes impose like constraints: federal law provides similar periods of limitations for similar actions. See 42 U.S.C. § 1986 (one-year statute of limitations); 28 U.S.C. § 2680(h) and 28 U.S.C. § 2401(b) (two-year limitations period for actions against federal law enforcement officers for assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution).

The mere fact that the plaintiff is barred from recovery is not sufficient ground to declare state law "inconsistent" with federal law. *Robertson v. Wegmann*, 436 U.S. at 594-95. Because a two-year period of limitations

is neither too short nor discriminatory, it would be improper to reject the state's determination that a § 1983 claim is most analogous to a claim under section 12.

II. Even If A Federal Court Is Free To Ignore The Determination Made By A State's Highest Court Of The State Cause Of Action Most Analogous To § 1983, The Court Below Erred In Failing To Find That N.M. Stat. Ann. § 41-4-12 Is The State Cause Of Action Most Analogous To This Action And In Failing To Apply To The Plaintiff's Claims The Limitations Period Set Forth In N.M. Ann. § 41-4-15.

This Court, in *Board of Regents v. Tomanio*, held that the statute of limitations applicable to an action filed under § 1983 is that statute of limitations applicable to the most analogous state action. 446 U.S. at 483-84. The purpose of identifying the most analogous state action is to enable the court to identify the statute of limitations that "would have been applied to the action if it had been brought in a state court." See *supra* Point I. Thus, if a specific statute has not been selected by a state as one applicable to an action filed under § 1983, it becomes incumbent on the federal court to determine the state action that would be most analogous to the case before it and to use the limitations period that would be applicable to that state action. In the instant case, however, the courts below not only ignored the state's controlling choice of a limitations period, they also refused to identify an analogous cause of action within the context of state law as required by *Tomanio*. Thus, even if the New Mexico Supreme Court's decision in *DeVargas* is not dispositive of this case, the court below erred in refusing to follow appropriate guidelines for selecting, in the absence of a controlling state

decision, the limitations period applicable to a § 1983 action.

A. The Characterization of a § 1983 Action Should Properly Be Undertaken in the Context of the State's Scheme of Limitations, Taking into Account the Factors Considered by the State in Effecting the Balancing of Policies Relevant to Issues of Repose.

The trial court and the court of appeals disagreed on the appropriate characterization of an action brought under § 1983. The trial court characterized the action as "an action on a statute," while the court of appeals characterized it as "an action for injury to personal rights." The characterization processes that both the Tenth Circuit and the trial court employed, however, suffer from the same defect: both courts characterized all § 1983 actions uniformly without reference to the state's scheme of limitations or to the factors considered relevant by each state in enacting its statutes.

The problem with the approach taken by the courts below is this: state statutes of limitations cannot be applied in a vacuum. The varying periods of limitations provided by state law represent society's necessary value judgment, a balancing of a plaintiff's right to recover in a given action and society's interest in prohibiting the prosecution of a stale claim. *Board of Regents v. Tomanio*. Statutes of repose are therefore integrally related to the nature of the actions they affect and vary in length of time because different periods of time affect fact-finding accuracy and settled expectations in differing degrees depending on the factual nature of the action and the parties

involved in the suit. Limitations periods, for example, may respond to the varying needs of preserving evidence, *see Aitchison v. Raffiani*, 708 F.2d at 103 (noting that "the problem of preserving evidence may be more difficult when the defendant is an elected body whose members serve for relatively short terms"), and often incorporate public policies such as those relating to fiscal responsibility, *Espanola Housing Authority v. Atencio*, 90 N.M. 787, 789, 568 P.2d 1233, 1235 (1977) (shorter statutes of limitations for public defendants are justified because they reduce insurance rates and promote tax collection efficiency by assuring more accurate fiscal planning).

A single statute of limitations thus cannot be fully understood or correctly applied unless considered in the context of the causes of action recognized by the state and how the state applies its statutes of limitations to those actions. *Board of Regents v. Tomanio*; *Runyon v. McCrary*; *Aitchison v. Raffiani*; *see Jones v. Orleans Parish School Board*; *Major v. Arizona State Prison*. Characterizing an action outside of this context results in an arbitrary selection of a statute of limitations unrelated to any policies of repose considered by the state in enacting its limitations scheme. *See Board of Regents v. Tomanio*; *Johnson v. Railway Express*, 421 U.S. at 463. If state law is to be applied at all in § 1983 actions, it should be applied in a reasoned fashion. Given that § 1988 borrows not only the time limits imposed by state law but also the policies that these time limits embody, *Board of Regents v. Tomanio*, the characterization of an action for the purpose of identifying an analogous state action should be based on the various factors considered by each state to be im-

portant in implementing its policies of repose.⁸ *Aitchison v. Raffiani*; *Ammlung v. City of Chester*, 494 F.2d 811, 814 (3d Cir. 1974); *McClam v. Barry*; *see Board of Regents v. Tomanio*, 446 U.S. at 487.

If a state's scheme of limitations incorporates different limitations periods for factually distinct common law claims, these distinctions, based on the underlying conduct alleged, should be respected in characterizing an action for statute of limitations purposes.⁹ *See, e.g., Suthoff v. Yazoo*

⁸ The emphasis placed by this Court in *Tomanio* and *Johnson* on the fact-finding process, settled expectations, and the implementation of state policies of repose supports the proposition that the characterization of a § 1983 claim must be made in the context of state law. "On many prior occasions, we have emphasized the importance of the policies underlying state statutes of limitations. Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. at 487.

⁹ If two claims, such as "common-law assault and constitutional assault (as alleged here), are so alike that 'plaintiffs can be expected to plead [the] common law [claim] as a pendent claim in constitutional suits,' . . . then the same judgment about repose applies to both claims." *McClam v. Barry*, 697 F.2d at 375. There is little justification for establishing different periods of limitations for factually similar claims against the same defendants. *Id.* *White v. United Parcel Service*, 692 F.2d 1 (5th Cir. 1982), cert. denied, 104 S. Ct. 186 (1983); *Miller v. City of Overland Park*, 231 Kan. 557, 646 P.2d 1114, 1118 (1982) ("the very reason for § 1988 and the application of state periods of limitation to § 1983 actions is to avoid [the] inconsistency" that would result from applying "a different statute of limitations than that provided by the state for a common law or state statutory action on the identical set of facts"). *See, e.g., Cowdrey v. City of Eastborough, Kansas*, 730 F.2d 1376 (10th Cir. 1984) (holding constitutional claims based on false arrest and wrongful detention timely under two-year limitations period while dismissing factually identical claims pursuant to one-year limitations period).

County Industrial Development Corp., 722 F.2d 133 (5th Cir. 1983); *Gashgai v. Leibowitz*, 703 F.2d 10 (1st Cir. 1983); *McClam v. Barry*; *Kilgore v. City of Mansfield*, 679 F.2d 632 (6th Cir. 1982); *Polite v. Diehl*. Similarly, if a state recognizes a specific period of limitations for actions against a certain class of defendants, then this fact too should be taken into account. *Foster v. Armontrout*, 729 F.2d 583 (8th Cir. 1984); *Aitchison v. Raffiani*; *Blake v. Katter*, 693 F.2d 677 (7th Cir. 1982); see *Burnett v. Grattan*, 104 S. Ct. at 2934 (Rehnquist, J., concurring); cf. *Robertson v. Wegmann*. If, as the Tenth Circuit held, the constitutional nature of the right violated in a § 1983 action was to be of overriding importance in selecting a state statute of limitations, "the Court would, presumably, have said so, and would not have directed that the period chosen be that applicable to a 'closely analogous claim.'" *McClam v. Barry*, 697 F.2d at 373 (holding that while "constitutional claims differ from closely analogous common law claims in the interests they protect, in their elements and origins, and in their importance," these differences do not require rejection of the local limitations period for the factually analogous common law cause of action).¹⁰

¹⁰ Prior to its ruling below, the Tenth Circuit had consistently held that the characterization of a civil rights action for the purpose of selecting a state statute of limitations should be made in the context of state law, with reference to "the particular allegations of the claim" alleged. *Jackson v. City of Bloomfield*, 731 F.2d 652, 653 (10th Cir. 1984). The case of *Zuniga v. AMFAC Foods, Inc.*, 580 F.2d 380, 383 (10th Cir. 1978), overruled in *EEOC v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984), decided by the Tenth Circuit in 1978, is illustrative. In that case, the Tenth Circuit held that the "most analogous state action" for the purpose of selecting a statute of limitations is that cause of action which would arise under state law out of the underlying conduct on which a plaintiff bases his claim.

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The court below attempted to justify its blanket characterization of § 1983 actions without reference to individual state law by citing a need for uniformity in the federal courts. This Court, however, specifically has ruled that "[t]he need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant the displacement of state statutes of limitations for civil rights actions." *Board of Regents v. Tomanio*, 446 U.S. at 489; *Robertson v. Wegmann*, 436 U.S. at 592-93 and 593 n.11. The court below also expressed concern over the possibility of confusion resulting from having to select an analogous state action within the context of the state's scheme of limitations. This analysis, however, involves nothing more than the analysis involved in any other federal action for which no statute of limitations is provided, see *International Union v. Hoosier Cardinal Corp.*, or, for that matter, in any diversity case, see *Bauserman v. Blunt*, 147 U.S. 647 (1893). The problem raised by the court is hardly unique; it is precisely the dilemma faced by every litigant in virtually every action filed in state court.

If this Court had intended that all § 1983 actions be uniformly characterized as actions on a statute or actions for personal injury, it could have dispensed with its mandate to examine analogous state causes of action and simply instructed the courts to determine whether a state has a

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In so holding, the court in *Zuniga* specifically rejected the view that all civil rights actions should be characterized uniformly for the purpose of selecting an appropriate statute of limitations. 580 F.2d at 383. The court of appeals, in its opinion below, rejected the factual approach to characterization adopted in *Zuniga*, not, apparently, because *Zuniga* was wrongly decided, but because its application was difficult. 731 F.2d at 649-50.

statute of limitations applicable to "actions on a statute" or "actions for injuries to personal rights."¹¹ See *Burnett v. Grattan*, 104 S. Ct. at 2934 (Rehnquist, J., concurring); *Runyon v. McCrary*; *McClam v. Barry*. As this Court has noted, however, there really is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law." *Johnson v. Railway Express*, 421 U.S. at 464. The court below therefore erred in refusing to determine the action under state law that would be analogous to the plaintiff's claims and then to apply to this action the statute of limitations applicable to that analogous state action.

B. N.M. Stat. Ann. § 41-4-12 (1978) Provides the State Cause of Action Most Analogous to the Plaintiff's § 1983 Claims Because the Plaintiff Seeks Damages for the Deprivation of Constitutional Rights Arising out of an Assault and Battery by a Law Enforcement Officer and That Statute Provides That a Plaintiff May Recover Damages from a Law Enforcement Officer for Assault, Battery or the Deprivation of State or Federal Constitutional Rights.

Even if the federal courts were not bound by New Mexico's express choice of a two-year limitation for § 1983 actions against law enforcement officers, this action should

¹¹ The anomalous results which obtain when an action is characterized independently of state law are illustrated by the fact that at least two states in the Tenth Circuit have no statute of limitations applicable to "actions for injury to personal rights." See *McKay v. Hammock*, 730 F.2d 1367 (10th Cir. 1984) (Colorado); *Mismash v. Murray City*, 730 F.2d 1366 (10th Cir. 1984) (Utah).

have been dismissed. If the courts below had correctly undertaken an independent search for the applicable statute of limitations, they would have concluded, as did the *DeVargas* court, that section 12 of the New Mexico Tort Claims Act, N.M. Stat. Ann. § 41-4-12 (1978), embodies the state cause of action most analogous to this action. The specific provisions of section 12 clearly demonstrate that an action brought under that section is more analogous to the § 1983 claims raised in this case than a generalized action for injuries to personal rights. The court of appeals' adoption of § 37-1-8 as the statute of limitations that applies to this case therefore ignores the state's judgment that the two-year limitations period applicable to actions brought under Section 12 more appropriately governs claims such as those raised by the plaintiff.

Section 1983 provides a remedy for assaults by police officers resulting in the "deprivation of any rights, privileges, or immunities secured by the constitution and laws of the United States when caused by" persons acting under color of state law. Similarly, section 12 provides a remedy for assault, battery and the deprivation of any "rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties." N.M. Stat. Ann. § 41-4-12 (1978).

If the New Mexico Legislature had drafted section 12 for the sole purpose of creating a state forum for a cause of action analogous to a federal cause of action against law enforcement officers under § 1983, it would be difficult to conceive of the legislature using language different from the language of section 12. The relevant portions of section 12 are identical in all material respects with the lan-

guage of 42 U.S.C. § 1983.¹² Section 12, in fact, provides the state counterpart to § 1983: it creates a private right of action for the deprivation of New Mexico constitutional rights.

In addition, the plaintiff's constitutional claims in this case arise out of an assault and battery by a law enforcement officer. Since section 12 imposes liability for injuries¹³ resulting from an assault or battery by a law enforcement officer, the common law cause of action most analogous to the plaintiff's § 1983 action is set forth in section 12.

Section 15 provides a two-year limitations period for "actions against a governmental entity or public employee for torts,"¹⁴ and applies to all actions brought under

¹² The operative language of the two statutes is as follows:
42 U.S.C. § 1983

Every person who, under color of [state law] . . . causes . . . the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

N.M. Stat. Ann. § 41-4-12 (1978)

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for . . . deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

¹³ Section 12 distinguishes between personal injury and bodily injury, and compensates both.

¹⁴ Thus, whether this action is characterized as a constitutional or assault and battery claim under section 12, or as any common law tort, or for that matter as an injury to personal rights, section 15 applies to the plaintiff's claims.

section 12, *DeVargas*, 97 N.M. at 564, 642 P.2d at 167. Although dicta in *Burnett* suggests that certain state policies might be irrelevant to the selection of a state statute of limitations, 104 S. Ct. at 2932 n. 18, but cf. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (recognizing distinction among defendants for the purpose of awarding punitive damages), no question has been raised in this matter regarding the propriety of applying to this action a statute of limitations which is applicable to a specific entity. Indeed, decisions of this Court appear to require that the identity of the party sued be taken into account in selecting a state statute of limitations in a § 1983 action if the state itself considers this factor relevant to its system of limitations. See *Board of Regents v. Tomanio*; *Robertson v. Wegmann*; *Runyon v. McCrary*; *Johnson v. Railway Express*.

In New Mexico, the state legislature has enacted a statutory scheme of limitations which establishes limitations periods based on several factors, including the nature of the right violated, compare N.M. Stat. Ann. § 37-1-8 (three-year limitations period for personal injuries) with N.M. Stat. Ann. § 37-1-4 (four-year limitations period for property damage and for unwritten contracts); the underlying facts alleged, compare N.M. Stat. Ann. § 37-1-4 (four-year limitations period for unwritten contracts) with N.M. Stat. Ann. § 37-1-3 (six year limitations period for written contracts); and the identity of the party sued, see, e.g., N.M. Stat. Ann. § 41-5-13 (1978) (three-year limitations period for malpractice claims against health care providers). Consistent with this scheme, section 15 imposes a specific limitations period on actions for torts filed against governmental entities or public employees. *DeVargas*; *Cozart v. Town of Bernalillo*, 99 N.M. 737, 663 P.2d 713 (Ct. App.

1983). Similarly, N.M. Stat. Ann. § 37-1-24 (1978) provides a specific limitations period for actions on contracts and similar claims brought against cities, towns, villages or officers thereof. Thus, since New Mexico law specifically requires that limitations periods be applied in part on the basis of the identity of the party sued, this factor must be taken into account when selecting a statute of limitations applicable to a § 1983 action filed in a federal court sitting in New Mexico.

Under New Mexico law, the more specific statutes of limitations take precedence over and limit the application of general limitations periods. See, e.g., *Espanola Housing Authority v. Atencio*. The application of these specific limitations periods has been consistently upheld by New Mexico courts. *Espanola Housing Authority v. Atencio*; *Armijo v. Tandysh*, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), cert. denied, 459 U.S. 1016 (1982); see *Aragon & McCoy v. Albuquerque National Bank*, 99 N.M. 420, 659 P.2d 306 (1983); *DeVargas*. Thus, in New Mexico, if an action for personal injuries is brought against a governmental entity or public employee, the specific applicability of section 15 would preclude the application of the more general provisions of § 37-1-8. Since New Mexico law recognizes distinctions based on classes of defendants in applying its own limitations periods, § 1988 requires that these distinctions be respected by a federal court.¹⁵

¹⁵ As is apparent from the discussion above, N.M. Stat. Ann. § 41-4-15 (1978) is not unique in considering, in part, the identity of the parties as a factor in establishing a limitations period. For example, N.M. Stat. Ann. § 41-5-13 (1978) provides a spe-

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The case of *Aitchison v. Raffiani* is on point. In that case, the Third Circuit held that a § 1983 claim filed in a federal court sitting in New Jersey was governed by the New Jersey statute of limitations applicable to actions filed against governmental entities. The court held that in selecting a state statute of limitations applicable to a § 1983 action, "[t]he essential nature of the federal claim, including the relief sought and the type of injury alleged should be examined 'within the scheme created by the various state statutes of limitations.'" 708 F.2d at 101. The Third Circuit found persuasive New Jersey cases which held that the specific limitations provisions of the New Jersey Tort Claims Act, rather than the more general limitations provisions of New Jersey law, applied to

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cific limitations period for malpractice actions against health care providers. In *Armijo v. Tandysh*, the New Mexico Court of Appeals addressed whether this specific limitation for a single class of defendants was valid. At issue was whether the time of accrual of an action under the Medical Malpractice Act discriminated against plaintiffs who sued health care providers. In *Armijo*, the plaintiff, as personal representative, sought damages for medical malpractice resulting in death. Under the state Wrongful Death Act, N.M. Stat. Ann. §§ 41-2-1 to -4 (1978), the claim would not have accrued until the time of death and would not have been time-barred, but under the Medical Malpractice Act, the claim accrued at the time the malpractice occurred, N.M. Stat. Ann. § 41-5-13 (1978), and was time-barred. The court of appeals ruled that the specific provisions of the Medical Malpractice Act controlled, and that the distinction between wrongful death claims filed against health care providers and wrongful death claims filed against others was not violative of equal protection or due process. Other New Mexico statutes which are based in part upon the identity of the parties include N.M. Stat. Ann. § 37-1-8 (limitations of actions against sureties); N.M. Stat. Ann. §§ 41-2-3 and -4 (wrongful death action to be brought by personal representatives except that a wrongful death action may be brought by the spouse, or other close relatives if death was caused by a railroad, stage coach or other public conveyance).

actions involving governmental entities. Based on these cases, the court ruled that the two-year limitations period set forth in the Act would have applied to the case had it been brought in state court and thus should be applied to the action filed in federal court.

The court in *Aitchison* found that it was "not unreasonable for a state to assume that the public interest in the repose of claims against a governmental agency is worthy of special consideration," and noted that "the problem of preserving evidence may be more difficult when the defendant is an elected body whose members serve for relatively short terms." 708 F.2d at 103. *Cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. at 271 ("we are sensitive to the possible strain on local treasuries and therefore on services available to the public at large"). The *Aitchison* court, therefore, noting "the Supreme Court's admonition in *Tomanio* that we consider state statutes that are borrowed for limitations purposes as 'binding rules of law,'" concluded that "different [state] statutes of limitations for actions against public and private entities *must be respected* [in a § 1983 action filed in federal court] if the periods are otherwise proper." 708 F.2d at 103 (emphasis added). *See also Foster v. Armontrout*, 729 F.2d at 585 (applying limitations period applicable to actions "against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office"); *Blake v. Katter*, 693 F.2d 677 (7th Cir. 1982) (applying limitations period applicable to actions against a share for other public officer); *Kosikowski v. Bourne* (applying limitations period applicable to actions against public bodies, officers, employees and agents); *Green v. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978) (applying limitations period set forth above in reference to *Foster*); *cf. Stewart v. City of Northport*, 425 So. 2d 1119 (Ala. 1983)

(Alabama statute of limitations applicable to actions against municipalities govern § 1983 action brought against an Alabama city).

There is nothing anomalous in deferring to a state's recognition of distinctions based on the identity of parties to an action. In *Robertson v. Wegmann*, for instance, this Court held that Louisiana survivorship law was applicable to a § 1983 claim. Louisiana recognizes survival of actions only if the decedent is survived by a spouse, child, parent or sibling. Even though application of Louisiana survivorship law resulted in abatement of the § 1983 action in *Robertson*, the Court upheld the state rule. "[G]iven that most Louisiana actions survive the plaintiff's death, the fact that a particular action might abate surely would not adversely affect § 1983's role in preventing official illegality. . . ." 436 U.S. at 592. In the instant case, as in *Robertson*, recognition of the distinctions made by the state would not frustrate the purposes of § 1983. A plaintiff with a valid claim will be compensated if he brings his action within two years; thus, a "state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him." *Id.*

By ignoring the factors considered relevant by the state in enacting its various statutes of limitations, the decision of the court below fails to reflect any legislative consideration of the policies supporting different periods of repose for different claims. The resulting unreasoned adoption of limitations periods for § 1983 claims violates the spirit and the letter of § 1988's mandate to apply state law. The court below elevated the goal of uniformity above the clear direction of Congress to apply state law.

Had the court analogized this § 1983 action to a state cause of action within the context of New Mexico's scheme of limitations, it would have reached the same conclusion reached by the state courts: that section 12 provides the state cause of action most analogous to the plaintiff's claims and that the two-year limitations period set forth in section 15 should apply to this action.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the judgment of the United States Court of Appeals for the Tenth Circuit be reversed with instructions that the complaint in this action be dismissed.

Respectfully submitted,

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